

A Padiberas Nasional Bhd v Formula Timur Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING UP)
NO D8–28–318 OF 2006

B KANG HWEE GEE J
10 MARCH 2009

C *Companies and Corporations — Winding up — Petition — Failure in carrying out objective of joint venture agreement — Whether breakdown in mutual trust and confidence between parties to agreement — Whether formed good grounds for winding-up petition — Whether just and equitable to wind up company*

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The respondent was a company formed pursuant to a joint venture agreement, with three shareholders namely; the petitioner, Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd ('Konsortium Pemborong') and Konsortium Perdagangan Pantai Timur Sdn Bhd ('Konsortium Perdagangan'). The petitioner owned 800,001 shares of the respondent company, had petitioned to wind up the respondent company. However, Konsortium Pemborong, which owns 800,000 shares in the respondent company, opposed the petition. Another shareholder, Konsortium Perdagangan did not oppose the petition. The petitioner argued that Konsortium Pemborong failed to provide management expertise, training and develop personnel able to conduct the business of the respondent company in accordance to the cl 12 of joint venture agreement resulting the respondent company to incur losses. The petitioner had tried to manage the respondent company but found it difficult as Konsortium Pemborong was hostile to interference of the petitioner in the business of the respondent company. The petitioner submitted that due to difficulties in getting the quorum among the directors of the respondent company, a resolution was passed to dismiss the personnel of the respondent company. Relying on *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, the petitioner argued that the objective of the joint venture agreement had been destroyed hence, forming the basis for the winding up petition. Konsortium Pemborong submitted, inter alia: (1) that the petitioner had unilaterally undertaken action that had undermined the purpose of the joint venture agreement resulting in the respondent company incurring losses, (2) that no resolution was passed by the board of directors of the respondent company for filing of the winding up petition. Konsortium Pemborong further argued that the petitioner had not come to this court with clean hands to wind up the respondent company.

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Held, allowing the application with costs:

- (1) As a result of breakdown in mutual trust and confidence between the petitioner and Konsortium Pemborong (both companies owned 80% of the total shareholding of the respondent company) it was no longer possible for the parties to agree on the future conduct of the respondent company thereby destroying the objective of the joint venture agreement. Konsortium Pemborong had failed to fulfil its obligations under cl 12 of the joint venture agreement to provide management expertise and training in developing personnel to manage the respondent company. The loss suffered by the petitioner in having to appoint their own personnel to manage the respondent company in order to salvage it was attributed directly to the failure of Konsortium Pemborong to perform its obligation under cl 12 (see paras 17–19).
- (2) It was sufficient that the petitioner in this petition to show that the actions were brought about by Konsortium Pemborong's fault on account of the failure of its obligation under cl 12 of the joint venture agreement. If Konsortium Pemborong had complied with its obligation to set up effective machinery to manage the operation of the respondent company, the breakdown of its relationship under the joint venture agreement would not have materialised. Hence, it was just and equitable that the respondent company be wound up pursuant to s 218(1)(i) of the Companies Act 1965 (see paras 19–20).

[Bahasa Malaysia summary]

Responden merupakan sebuah syarikat yang ditubuhkan menurut perjanjian usahasama, dengan tiga pemegang saham iaitu; pempetisyen, Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd ('Konsortium Pemborong') dan Konsortium Perdagangan Pantai Timur Sdn Bhd ('Konsortium Perdagangan'). Pempetisyen memiliki 800,001 saham-saham syarikat responden, telah mendaftarkan untuk menggabungkan syarikat responden. Walau bagaimanapun, Konsortium Pemborong, yang memiliki 800,000 saham-saham dalam syarikat responden, membantah petisyen tersebut. Pemegang saham yang lain, Konsortium Perdagangan tidak membantah petisyen tersebut. Pempetisyen mendakwa bahawa Konsortium Pemborong telah gagal untuk menyediakan kemahiran pengurusan, latihan dan membangunkan kakitangan untuk menjalankan perniagaan syarikat responden menurut klausa 12 perjanjian usaha sama menyebabkan syarikat responden mengalami kerugian. Pempetisyen cuba untuk menguruskan syarikat responden tetapi mengalami kesukaran kerana Konsortium Pemborong menentang campur tangan pempetisyen dalam perniagaan syarikat responden. Pempetisyen berhujah bahawa disebabkan kesukaran dalam mendapatkan kuorum di kalangan pengarah-pengarah syarikat

- A responden, satu resolusi telah diputuskan untuk menyingkirkan kakitangan syarikat responden. Bergantung kepada *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, pempetisyen mendakwa bahawa tujuan perjanjian usaha sama telah musnah dan oleh itu, menjadi asas kepada petisyen penggulungan.
- B Konsortium Pemborong menghujah antara lain: (1) bahawa pempetisyen secara sebelah pihak telah melakukan tindakan yang telah menjejaskan tujuan perjanjian usaha sama menyebabkan syarikat responden mengalami kerugian, (2) bahawa tiada resolusi yang diputuskan oleh lembaga pengarah syarikat responden untuk memfailkan petisyen penggulungan. Konsortium Pemborong selanjutnya mendakwa bahawa pempetisyen tidak mengambil tindakan di mahkamah dengan suci hati untuk menggulungan syarikat responden.
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- D **Diputuskan**, membenarkan permohonan dengan kos:
- (1) Disebabkan oleh kepecahbelahan dalam kepercayaan dan keyakinan di antara pempetisyen dan Konsortium Pemborong (kedua-dua syarikat memiliki 80% jumlah pegangan saham syarikat responden) tidak mungkin untuk pihak-pihak tersebut bersetuju terhadap tindakan-tindakan masa hadapan oleh responden yang dengan itu memusnahkan tujuan perjanjian usaha sama. Konsortium Pemborong telah gagal untuk memenuhi kewajipannya di bawah klausa 12 perjanjian usaha sama untuk menyediakan kemahiran pengurusan dan latihan untuk membangunkan kakitangan untuk menguruskan syarikat responden. Kerugian yang dialami pempetisyen dalam melantik kakitangan mereka untuk menguruskan syarikat responden bagi tujuan menyelamatkannya berpunca secara langsung daripada kegagalan Konsortium Pemborong untuk menjalankan kewajipannya di bawah klausa 12 (lihat perenggan 17–19).
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- (2) Memadai bahawa pempetisyen dalam petisyen ini menunjukkan bahawa tindakan tersebut dibuat kerana kesalahan Konsortium Pemborong yang gagal memenuhi kewajipannya di bawah klausa 12 perjanjian usaha sama. Sekiranya Konsortium Pemborong memenuhi kewajipannya untuk mendirikan jentera yang berkesan untuk menguruskan syarikat responden, maka kepecahbelahan hubungan di bawah perjanjian usaha sama tidak akan menjadi kenyataan. Oleh itu, adalah adil dan saksama bahawa syarikat responden digulungan menurut s 218(1)(i) Akta Syarikat 1965 (lihat perenggan 19–20).]
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Notes

For cases on winding up petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

Cases referred to

A & BC Chewing Gum Ltd Topps Chewing Gum Inc, Re v Coakley & Ors [1975] 1 WLR 579, Ch D (refd) A

Abbey Leisure Ltd, Re [1990] BCC 60, CA (refd)

Diamond Fuel Co, Re (1879) 13 Ch D 400, CA (refd)

Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360, HL (folld) B

Kitson & Co Ltd, Re [1946] 1 All ER 435, CA (refd)

O'Neill v Philips [1999] 1 WLR 1052, HL (refd)

Thomas Edward Brinsmead & Sons, Re [1897] 1 Ch 406, CA (refd)

Yenidje Tobacco Co Ltd, Re [1916] 2 Ch 426, CA (refd) C

Legislation referred to

Companies Act 1965 ss 181, 218(1)(i)

Amir Salleh (Kadir Andri & Partners) for the petitioner. D

Clinton Nicholas Gomez (Rajindar Singh Veriah & Co) for the respondent.

Kang Hwee Gee J (delivering oral judgment):

[1] This is a petition under s 218(1)(i) of the Companies Act 1965 to wind up the company on the just and equitable principle. E

[2] The respondent company was conceived pursuant to a joint venture agreement called *Perjanjian Usahasama* between three shareholders — Padiberas Nasional Bhd (the petitioner), Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd and Konsortium Perdagangan Pantai Timur Sdn Bhd. F

[3] The main object of the company under its memorandum and articles of association is to: G

(a) to act as agents, negotiators or intermediaries for or in relation to any business or trade or any contracts, orders, tenders, concession or privileges in connection therewith; H

(b) to carry on the business of general merchants, general importers and exporters, manufacturers, commission agents and wholesale or retail dealers of articles and products of all kinds and to buy, sell, barter exchange or otherwise deal the same; and I

(c) to carry on any other business which may seem to the company capable of being conveniently carried on in connection with its business or calculated directly or indirectly enhance the value of or render profitable any of the company's property or rights.

- A [4] In the event of a conflict between the terms of the joint venture agreement and the provisions of the memorandum and articles of association of the company the terms of the joint venture agreement will prevail and be regarded as the terms to be adhered by the parties to the joint venture agreement.
- B [5] The company is at present dormant having stopped its business on 10 May 2002.
- C [6] The petitioner owns 800,001 shares in the respondent company. Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd owns 800,000 shares and is opposing this petition. The other shareholder Konsortium Perdagangan Pantai Timur Sdn Bhd who owns 399,999 shares did not oppose this petition as it has not filed any affidavit to do so.
- D *Mr Clinton Gomez for Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd (the opposing party)*
- E (1) The decision of the respondent company which was wholly controlled by the petitioner to stop the supply of rice by the petitioner through the petitioner's subsidiary known as Edaran Beras Nasional Sdn Bhd was made in breach of the joint venture agreement in that the said decision undermined the purpose of the joint venture agreement which was to sell rice at a profit and without any unfair competition. Such decision was made without consulting the Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd which was required under the joint venture agreement. As a result the company is now facing financial difficulties as the company has now lost its business.
- F (2) The action of the respondent resulted in the suit being filed by my client under s 181 of the Companies Act 1965. There was also a derivative action being filed. The suits were filed against the petitioner. In the event the petitioner is made liable then damages would have to be paid to the respondent company by the petitioner.
- G (3) There were other decisions which were taken by the respondent company through the petitioner who is the controlling shareholder which has led the respondent company to suffer losses. Such decision had been made without consulting my client.
- H (4) The petitioner in short has not come to this court with clean hands to wind up the respondent.
- I *Encik Amir Salleh for the petitioner*
- [7] The respondent company commenced its business in December 2001. Under cl 12 of the joint venture agreement Konsortium Pemborong the opposing party was responsible for providing the management expertise for

the respondent company and also responsible for training and developing a group of professionals to carry out the business of the company as Konsortium Pemborong was based in Kelantan and was in control of the management of the respondent company whose business was in Kelantan. They failed to fulfil their promise under cl 12 resulting in loss to the respondent company in a sum of RM21m in the first six months of business. See exh 'W-5' of encl 2. With this loss the petitioner was forced to come in to try and nurse the respondent company back to health. We appointed our own officers and tried to find ways to salvage the business. This however is difficult to implement as Konsortium Pemborong was hostile to interference to the business. The changes were made legally through the board by the petitioner. Thereafter three actions were commenced by the Konsortium Pemborong. The first action was a s 181 petition against the respondent company and the other two joint venture members. This petition was struck off. The second one was a third party proceeding commenced in Kota Bharu against the petitioner purportedly by the respondent company as it was commenced without authority from the board in breach of the articles and association which require authority from the board to commence and carry out the proceeding and has also been struck off for lack of authorisation and costs were awarded against the officers of Konsortium Pemborong. The third action (the derivative action) was commenced to order the petitioner to sell and supply rice to Konsortium Pemborong despite the fact that it was never a term of the joint venture for rice to be supplied to Konsortium Pemborong. This suit is still ongoing but a striking out application has been filed for abuse of process.

[8] By initiating the three actions Konsortium Pemborong was treating the respondent company as if it was their own company without any care to the other joint venture partners and by failing to manage the company leading to loss of RM20m has resulted in the relationship of the joint venture company members breaking down, loss of mutual confidence and deterioration of the state of affairs of the company. It is now impossible for the directors to meet and conduct the business of the respondent as we cannot get the quorum because the joint venture members despise each other. The last meeting was held in 23 December 2005. The company is now devoid of personnel and had not been operating since 2002 and in December 2005 there was a resolution passed to dismiss all the employees which Konsortium Pemborong objected to at that meeting. The respondent is no longer an ongoing concern. For the financial year ending 2005 the respondent's balance sheet showed a loss of RM5.6m. The decision to stop the supply of rice by the petitioner through its subsidiary Edaran Beras was purely a commercial decision to mitigate its loss as it was owed RM20m. In any case the decision to stop supplying the rice is not in breach of the joint venture agreement as the petitioner's obligation under the agreement was only to provide customers for the respondent not supplying rice. Our subsidiary company Edaran Beras

A which had been supplying the rice to the respondent was owed RM20m. The debt was owed during the time when it was managed by Konsortium Pemborong.

B [9] The cessation of the supply of rice to the respondent was made the subject of a complaint some two years later when they filed the s 181.

[10] See *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426.

C [11] The breakdown in relationship has in fact been admitted in the opposing affidavit of the Konsortium Pemborong at para 16.

Reply by Mr Clinton Gomez

D (1) The debt owed by the respondent company to Edaran Beras was approximately RM6m as at 31 December 2002 based on the recollection of Zakaria a director of Konsortium Pemborong who sat on the board of the respondent company. NB: RM21m based on account of Edaran Beras.

E (2) No resolution passed by the board of directors of the respondent company for the filing of this winding up petition.

DECISION

F [12] Section 218(1)(i) gives the court the power to subject the strict legal rights of the shareholders to equitable consideration to decide whether a company should be wound up. The subsection is interpreted liberally and is not confined to any specific instances and is exercised in accordance with the needs of equity. Circumstances which had been held as appropriate to grant an order to wind up a company on the just and equitable grounds include:

G (a) where the formation of a company is for fraudulent or illegal purposes (*Re Thomas Edward Brinsmead & Sons* [1897] 1 Ch 406);

H (b) where there is oppression of the minority shareholders by a majority (*Re Diamond Fuel Co* (1879) 13 Ch D 400);

(c) where there is a deadlock in the management of a company (*Re A & BC Chewing Gum Ltd Topps Chewing Gum Inc v Coakley & Ors* [1975] 1 WLR 579);

I (d) where a company was set up for specific purpose and that purpose has either been attained and completed, or can no longer be attained (*Re Kitson & Co Ltd* [1946] 1 All ER 435);

(e) where the objective for which the company is set up has been achieved (*Re Abbey Leisure* [1990] BCC 60).

[13] In the instant case it is common ground that the company sought to be wound up is quasi partnership in the mould of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360.

[14] The grounds relied upon by the petitioner is the breakdown and soured relationship between the petitioner and Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd resulting in a deadlock that they are now no longer able to agree on the future conduct of the company thereby destroying the objective of the joint venture agreement. The petitioner relied on the oft-cited case of *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 at pp 430 and 431 per Lord Cozens-Hardy MR:

In those circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position? I think it is quite clear under the law of partnership, as has been asserted in this court for many years and is now laid down by the Partnership Act, that that state of things might be a ground for dissolution of the partnership for the reasons which are stated by Lord Lindley in his book on *Partnership* at p 657 in the passage which I will read, and which, I think is quite justified by the authorities to which he refers: 'Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.'

Now here we have this fact. Mr Rothman has commenced an action charging Mr Weinberg with fraud in obtaining the agreement under which he, Rothman, sold his business to the company. I ask myself the question: When one of the two partners has commenced, and has not discontinued, an action charging his co-partner with fraud in the inception of the partnership, is it likely, is it reasonable, is it common sense, to suppose those two partners can work together in the manner in which they ought to work in the conduct of the partnership business? Can they do so when things have reached such a pass, as they have here, that after an arbitration lasting eighteen days, an arbitration on the only point which was referred, which terminated in favour of Mr Weinberg, and to which Mr Rothman declines to give effect, in this sense, that although the award decided that Litiger had not been dismissed and ought to be continued as a servant of the firm until removed, Mr Rothman will not allow him to come and do his business, so that he, Litiger, is in the happy position now of receiving his wages of 5l a week without being allowed to do any work for the company in respect of which he is a servant?

The matter does not stop there. It is proved that these two directors are not on speaking terms, that the so-called meetings of the board of directors have been almost a farce or comedy, the directors will not speak to each other on the board, and some third person has to convey communications between them which ought to go directly from one to the other.

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- A Is it possible to say that it is not just and equitable that that state of things should not be allowed to continue, and that the court should not intervene and say this is not what the parties contemplated by the arrangement into which they entered? They assumed, and it is the foundation of the whole of the agreement that was made, that the two would act as reasonable men with reasonable courtesy and
- B reasonable conduct in every way towards each other, and arbitration was only to be resorted to with regard to some particular dispute between the directors which could not be determined in any other way. Certainly, having regard to the fact that the only two directors will not speak to each other, and no business which deserves the name of business in the affairs of the company can be carried on, I think the company should not be allowed to continue.
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- [15] That the breakdown was brought about by the conduct of the Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd is clear from the verifying affidavit of the petition of Wan Razif bin Wan Musa, the general
- D manager of the petitioner.
- [16] To sustain a petition to wind up the company under s 218(1)(i) on the just and equitable ground it is not enough merely to show that there had been an irretrievable breakdown in mutual trust and confidence between the
- E shareholders as this would tantamount to allowing the petitioner to unilaterally withdraw from the partnership which he had entered into to the detriment of the other partners (see *O'Neill v Philips* [1999] 1 WLR 1052). The petitioner would be required in this petition to show that the breakdown was attributable to its partner Konsortium Pemborong Beras Melayu
- F (Kelantan) Sdn Bhd the management of the company.
- [17] Having considered the submission of the parties I am satisfied that there is a breakdown in mutual trust and confidence between the petitioner and Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd (both of
- G whom own 80% of the total shareholding of the company) that it is no longer possible for the parties to agree on its future conduct. I am also satisfied that breakdown had been caused by the fault of Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd.
- H [18] I accept the submission of counsel for the petitioner that Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd had failed to fulfil the obligation under cl 12 of the joint venture agreement which requires them to provide management expertise and training to develop a group of
- I professionals to manage the company. Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd has not denied this allegation in its affidavit and hence this allegation must be accepted as accurate and true. The subsequent loss suffered by the petitioner in having to appoint their own personnel to manage the company in order to salvage it is attributed directly to the failure of Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd to perform its

obligation under cl 12. So are the court actions that followed (the petition by Konsortium Pemborong Beras Melayu (Kelantan) Sdn Bhd under s 181, the third party proceeding and the derivative action against the petitioner referred to by counsel for the petitioner in his submission) had their root in Konsortium Pemborong Beras failure to perform its obligation under cl 12. It would not be necessary for the purpose of this petition to determine each case on the merit. It is sufficient that the petitioner in this petition is able to show that the actions were brought about by Konsortium Pemborong Beras fault on account of the failure of its obligation under cl 12 of the joint venture agreement. Had Konsortium Pemborong Beras complied with its obligation to set up an effective machinery to manage the operation of the company under this clause the breakdown of their relationship under the joint venture agreement would not have materialised.

[19] For the foregoing reasons it is just and equitable that the respondent company be wound up pursuant to s 218(1)(i) of the Companies Act 1965.

[20] The application is allowed with costs.

Application allowed with costs.

Reported by Mashrifah Ravendran

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